

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ALFRED PARKS**

Claimant

VS.

**INTERSTATE BRANDS**

Respondent

AND

**KEMPER INSURANCE CO.**

Insurance Carrier

Docket No. 1,002,081

**ORDER**

Claimant requested review of the April 23, 2004 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on August 24, 2004.

**APPEARANCES**

Michael C. Helbert, of Emporia, Kansas, appeared for the claimant. James C. Wright, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties confirmed their earlier stipulation that if claimant's claim is found to be compensable, the resulting permanency is 21 percent to the shoulder.

**ISSUES**

The ALJ determined the claimant's accident date was November 3, 1997. He went on to conclude that claimant's application for hearing, which was filed on February 12, 2002, was not filed within three years of the accident date as required by K.S.A. 44-534. Accordingly, the ALJ denied claimant's request for benefits under the Kansas Workers Compensation Act, K.S.A. 44-501 et seq. (Act).

The claimant contends the ALJ erred in finding claimant's accident date was November 3, 1997. Claimant concedes he had an accidental injury in November of 1997

for which respondent provided treatment, but argues that his present impairment is not due to that single traumatic event in 1997. Rather, the evidence indicates his subsequent need for surgery and the resulting impairment is the result of repeated traumas he experienced while working for respondent that culminated in January 2002, when he was lifting a dock plate and suffered an acute onset of shoulder symptoms.

Respondent asserts the ALJ's findings should be affirmed. Respondent contends that claimant's need for surgery is a direct result and natural progression of his original 1997 injury. Respondent argues that claimant has failed to meet his burden of proof to establish that it is more likely than not that his shoulder problems are related to a series of accidents since 1997, rather than as a result of a natural progression from that injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a truck driver for respondent. His job required him to drive a truck with a manual transmission and repetitively unload trays of baked goods. On November 3, 1997 claimant was in Beloit, Wisconsin unloading racks from his truck. He injured his right shoulder during this process. Respondent was notified of the accident and over the next two months claimant was provided conservative medical care, physical therapy and taken off work for a period of time.

There is no indication within the records relating to this care that claimant was told he needed surgery. Rather, it appears that there was no evidence of significant deformity of the rotator cuff and that the rotator cuff thickness was well preserved.<sup>1</sup> Claimant was treated conservatively and released. There is no evidence that this treatment was anything other than reasonable under the circumstances.

Claimant returned to work on January 29, 1998 with no restrictions. In spite of his release, claimant continued to take over-the-counter pain medications in an effort to quell his pain. By claimant's description, he "ate" ibuprofen on a daily basis in order to keep working at his job. In addition, he also altered his methodology of driving his truck while working. Claimant was unable to lift his right arm to shift the gears so he leaned to the left in order to be able to reach the gear shift with his right arm. Claimant was, however, able to pass the commercial driving examinations required for his job. His symptoms would wax and wane and sometimes, if he turned his truck wrong, the symptoms would hit him again.<sup>2</sup>

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<sup>1</sup> Bieri Depo. at 17.

<sup>2</sup> R.H. Trans. at 16.

After returning to work he performed his job without any medical treatment until March 2001.

In March 2001, claimant acknowledged an increase in his right shoulder complaints following an event at home. Claimant was using a screwdriver and had pain much like that he experienced in 1997. Claimant was referred by his personal physician to Dr. James Glenn, an orthopaedist.

Dr. Glenn testified that he injected claimant's shoulder and claimant reported an immediate improvement in the pain complaints. By the end of April 2001 claimant was significantly better and no further treatment was recommended. Then in September 2001, claimant returned to see Dr. Glenn for a single visit complaining about an increase in shoulder symptoms stemming from claimant's yard work two weeks before. Apparently claimant had been using a scything tool to cut down weeds.

In January 2002, claimant again returned to Dr. Glenn complaining of right shoulder pain and difficulty working and sleeping. Strangely enough, claimant did not tell Dr. Glenn about an incident, which he now claims occurred just before this office visit, in Shreveport, Louisiana when he was lifting a dock plate and again felt symptoms in his right shoulder. Dr. Glenn ordered a MRI, which revealed a total absence of a rotator cuff in claimant's right shoulder.<sup>3</sup> Dr. Glenn recommended and later performed surgery, attempting to repair the damage. By all accounts, the damage to claimant's shoulder was significant and his recovery was difficult, due to repeated infections.

When deposed, Dr. Glenn indicated that neither the isolated incident using a screwdriver nor the event using a scything tool in the yard would have likely caused the condition identified in the MRI.<sup>4</sup> Instead, he believed the damage to claimant's shoulder occurred over a period of years and represents a chronic situation as evidenced by the total lack of a rotator cuff. Dr. Glenn admitted that the 1997 accident certainly played some part in the deterioration of claimant's shoulder anatomy.<sup>5</sup> Nonetheless, based upon the condition in claimant's shoulder which he personally observed during surgery, Dr. Glenn was persuaded that this injury involved new trauma superimposed on old.<sup>6</sup>

The surgery provided claimant with some relief, although the doctor testified that claimant has no functioning rotator cuff in his right shoulder. He indicated that claimant is a "tough old bird" who performs rather well under the circumstances.

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<sup>3</sup> Glenn Depo. at 8.

<sup>4</sup> *Id.* at 17.

<sup>5</sup> *Id.* at 24.

<sup>6</sup> *Id.* at 30-31.

When Dr. Glenn told claimant that surgery was necessary, claimant went to Greg Pendley, his supervisor. According to claimant, he told Mr. Pendley that he required treatment for his right shoulder. Mr. Pendley does not believe claimant reported a new injury stemming from the Shreveport incident, nor does he remember any meeting between himself, claimant and Dennis Bolen in January 2002. However, Mr. Bolen testified that he does recall a meeting with claimant. The focus of that conversation was claimant's complaint of shoulder pain and his request for treatment although he recalls nothing about an injury happening in Shreveport. There was apparently a decision to call the insurance carrier to see if the request should be honored. According to Mr. Bolen, the request was refused because there was no new accident. Mr. Bolen testified that had there been a new accident reported, the company would have provided treatment.<sup>7</sup>

This refusal to provide treatment was followed by an application for hearing which claimant filed on February 12, 2002. His last day of work for respondent before surgery was January 30, 2002.

For purposes of determining the timeliness of claimant's claim, the record indicates claimant was released by the treating physician on January 28, 1998, but temporary total disability benefits continued until February 2, 1998.<sup>8</sup> The last medical expense was paid on March 31, 1998.<sup>9</sup>

In June 2003, during the course of the litigation, claimant was evaluated by Dr. Lynn Curtis, at the request of his counsel. Dr. Curtis's examination documented a loss of right shoulder range of motion, muscle wasting in the right arm as well as chronic weakness and pain. Dr. Curtis opined that claimant's shoulder condition was the result of a combination of the 1997 injury and the repeated trauma brought about by work activities after claimant returned to work.<sup>10</sup> She agrees that the damage to the shoulder was cumulative in nature.<sup>11</sup>

At respondent's request claimant was also evaluated by Dr. Peter Bieri who testified that claimant's eventual shoulder problem is "a continuing progression from the original 1997 injury aggravated by two instances of injury not related to work activity."<sup>12</sup> When asked, Dr. Bieri expressly rejected the idea that claimant's shoulder injury was a result of

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<sup>7</sup> Bolen Depo. at 12.

<sup>8</sup> Pendley Depo., Resp. Ex. 1 at 1.

<sup>9</sup> *Id.*

<sup>10</sup> Curtis Depo. at 12-13.

<sup>11</sup> *Id.* at 55.

<sup>12</sup> Bieri Depo. at 7.

a series of accidents or injuries.<sup>13</sup> He indicated claimant had no history of significant medical treatment or complications since 1997 that would suggest he was getting worse over time. He further justifies his position by referencing claimant's own description of the source of his complaints. According to Dr. Bieri's records, claimant blamed "[o]ld age, pulling on cake racks" along with a fall on his shoulder 2 years ago for his shoulder complaints.<sup>14</sup> Dr. Bieri maintains that all of the medical evidence is suggestive of a single traumatic event in 1997 as the source of claimant's physical complaints. He explained that the instances of increased pain between 1997 and 2002 were aggravations in the sense that they caused pain but he does not mean the damage increased or became permanent.<sup>15</sup>

The ALJ concluded that claimant failed to establish that he sustained a series of injuries. Rather, that claimant was injured on November 3, 1997. The Board has considered the ALJ's findings and reviewed the record as a whole. The Board finds that the ALJ's conclusion as to the date of accident should be modified.

While it is true that there is not a great deal of detail contained within the record setting forth the daily activities of claimant's work, it is clear from his description of the original accident in 1997 and his subsequent efforts at driving a truck, shifting the gears along with all the tasks involved in his job that his activities were repetitive in nature. The Board believes that the greater weight of the evidence indicates claimant sustained a series of traumas to his shoulder while working. In 1997 no torn rotator cuff was conclusively identified and he was returned to work at his regular job. He continued his job, modifying his activities as needed to accommodate his ongoing shoulder complaints. Overtime, the act of lifting the trays, operating the manual transmission and driving the truck took its toll on his shoulder. There was a significant amount of deterioration in his shoulder which was documented by the MRI. So much so, in fact, that claimant had no functioning rotator cuff at least in March 2002. For these reasons, the Board finds the ALJ's Award must be modified to find that claimant sustained a series of injuries culminating on his last date worked, consistent with the principles set forth in *Treaster*, and its progeny.<sup>16</sup>

Having found the accident date is January 30, 2002, the Board must then find claimant's application for hearing is timely as it was filed with the Division on February 12, 2002 within the period set forth in the statute.

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<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 24-25.

<sup>16</sup> *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

The parties stipulated that in the event this claim was found to be timely, that claimant's permanent partial impairment was 21 percent to the shoulder. Therefore, the ALJ's Award is hereby modified and claimant is awarded 21 percent permanent partial impairment to the shoulder.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 23, 2004, is reversed, and an award is entered against respondent and its insurance carrier as follows:

The claimant is entitled to 9.14 weeks of temporary total disability compensation at the rate of \$417.00 per week in the amount of \$3,811.38 followed by 45.33 weeks of permanent partial disability compensation, at the rate of \$417.00 per week, in the amount of \$18,902.61 for a 21 percent loss of use of the shoulder, making a total award of \$22,713.99.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant  
James C. Wright, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director